Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2001

CHESTER BROST,
Petitioner,

vs.

KENNETH R. BRILEY,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. ON THE QUESTION OF TIMELINESS OF THE HABEAS PETITION UNDER 28 U.S.C. § 2244(d), SHOULD CERTIORARI BE ALLOWED SO THIS COURT MAY CONSIDER AND RESOLVE SOME PERPLEXING, RECURRING AND CONTINUING PROBLEMS FACING THE FEDERAL JUDICIARY -- EVIDENT FROM CONFLICTING AND CONFUSING FEDERAL DECISIONS WITH RESPECT TO WHETHER A STATE COLLATERAL ATTACK [such as an Illinois post-conviction petition] IS "PROPERLY FILED" FOR PURPOSES OF TOLLING THE FEDERAL HABEAS LIMITATION PROVISION, EVEN IF THE STATE COURT EVENTUALLY DETERMINES IT WAS UNTIMELY FILED, WHERE STATE PROCEDURE ALLOWS AN EXCEPTION TO THE STATE PC TIMELINESS REQUIREMENT [such as lack of culpable negligence] AND THE PETITIONER CLAIMS TO COME WITHIN SUCH EXCEPTION?

2. SHOULD CERTIFICATE OF APPEALABILITY HAVE ISSUED, IN THAT CONFLICTING FEDERAL DECISIONS ON THE TIMELINESS ISSUE (see Question 1) DEMONSTRATE THAT REASONABLE JURISTS COULD DISAGREE AS TO TIMELINESS?

3. SHOULD A STATE COURT DETERMINATION THAT A POST-CONVICTION PETITION IS UNTIMELY-FILED, BE INFLEXIBLY BINDING ON A FEDERAL COURT, WHERE, AS

HERE, PETITIONER CLAIMS THAT THE STATE COURT DETERMINATION VIOLATES DUE PROCESS UNDER THE 14th AMENDMENT TO THE U.S. CONSTITUTION BECAUSE IT WAS ARBITRARY AND CAPRICIOUS AS WELL AS IN CONTRAVENTION OF SETTLED STATE LAW?

4. DO PRINCIPLES OF STATUTORY CONSTRUCTION AND JUDICIAL ECONOMY MILITATE AGAINST THE DISTRICT COURT'S HOLDING THAT THE HABEAS HERE WAS UNTIMELY?

5. IN ANY EVENT -- SHOULD THE DISTRICT COURT HAVE APPLIED THE DOCTRINE OF "EQUITABLE TOLLING" OF THE FEDERAL HABEAS LIMITATION PERIOD?

PARTIES INVOLVED

In the appeal proceedings from the United States Court of Appeals for the Seventh Circuit's denial of petitioner's certificate of appealability:

Petitioner, Chester Brost, was the Appellant in the United States Court of Appeals for the Seventh Circuit.

Respondent, Kenneth Briley, Warden of Stateville Correctional Center, was the Appellee in the United States Court of Appeals for the Seventh Circuit.

* * *

Petitioner Charles Brost was the petitioner in the denial of his petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois, Eastern Division.

Respondent Kenneth Briley, Warden of Stateville Correctional Center, was the Respondent relative to petitioner's writ of habeas corpus, denied in the United States District Court for the Northern District of Illinois, Eastern Division.

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STILMAN, A., GRAMMATICALLY CORRECT: THE WRITER'S ESSENTIAL GUIDE TO PUNCTUATION, SPELLING, STYLE, USAGE AND GRAMMAR, PART FOUR: "Grammar, Positioning Modifiers Correctly," at 232 (Writer's Digest Books, Cincinnati, Ohio, 1997)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Chester Brost, prays that a writ of certiorari issue:

to the United States Court of Appeals for the Seventh Circuit, to review its denial of petitioner's certificate of appealability, and;

to the United States District Court for the Northern District of Illinois, to review its denial of petitioner's writ of habeas corpus.

Opinions and Orders Below

All of the following judgments and orders are unreported [unpublished], and all are contained in the Separate Volume Appendix to this Petition.

The Order of the United States Court of Appeals for the Seventh Circuit, No. 01-C-2673, April 29, 2002, denying request for a certificate of appealability, is set out at App. A, pp. App. 1-2.

The Memorandum Opinion And Order of the United States District Court For The Northern District of Illinois, Eastern Division, No. 01 C 2673, May 18,

2001, dismissing petitioner's petition for writ of habeas corpus, is set out at App. B, pp. App. 3-12.

The Order of the United States District Court For The Northern District of Illinois, Eastern Division, No. 01 C 2673, February 11, 2002, denying petitioner's motion to reconsider, or in the alternative, for a certificate of appealability, is set out at App. C, pp. App. 13-17.

The Order of the Appellate Court of Illinois, First District, No. 1-95-0576, March 1, 1996, affirming petitioner's conviction and sentence, is set out at App. D, pp. App. 18-22.

The Order of the Circuit Court of Cook County, Illinois, No. 93 CR 12680, January 8, 1997, denying petitioner's pro se "motion to toll post-conviction limitation statute and for appointment of counsel," is set out at App. E, pp. App. 23-25

The Order of the Circuit Court of Cook County, Illinois, No. 93 CR 12680, April 23, 1997, dismissing petitioner's pro se petition for post-conviction relief, is set out at App. F, pp. App. 26-30.

The Order of the Circuit Court of Cook County, Illinois, No. 93 CR 12680, June 11, 1997, denying petitioner's pro se motion for reconsideration, is set out at App. G, pp. App. 30-31.

The Order of Appellate Court of Illinois, First District, Fourth Division, People v. Brost, Nos. 1-97-0733 and 1-97-2737 consolidated, entered March 4, 1999, granting leave for new counsel to substitute as counsel on appeal, and to file Supplemental Brief within 35 days, is set out at App. H, pp. App. 32-33.

The judgment (Order) of the Appellate Court of Illinois, First Judicial District, Nos. 1-97-0733 and 1-97-2737 consolidated, affirming summary dismissal of petitioner's post-conviction petition, entered March 31, 1999, is set out at App. I, pp. App. 34-38.

The Orders of the Illinois Appellate Court, First Judicial District, Nos. 1-97-0733 and 1-97-2737 consolidated, denying leave to file his Supplemental Brief instanter (App. J, pp. App. 39-40) and to enlarge the record, (App. K, pp. App. 41-43), both entered April 22, 1999, are set out in the separate volume Appendix.

The Order of the Illinois Appellate Court, First Judicial District, Nos. 1-97-0733 and 1-97-2737 consolidated, entered May 6, 1999, on reconsideration, denying motions for leave to file supplemental brief and to enlarge the record, is set out at App. L, pp. App. 43-44.

The Order of the Appellate Court in the above cause, entered Aug. 5, 1999, denying motion of new counsel requesting leave of court to file a

supplemental brief on behalf of Appellant, where the ineffective assistance of former counsel caused same to be presented out-of-time, is set out at App. M, pp. App. 45-46.

The Orders of the Supreme Court of Illinois, in Chester Brost, movant v. Justices of the First District Appellate Court, Fourth Division, et al., respondents, No. 87561 (entered June 18, 1999) and No. 88191 (entered Sept. 21, 1999), respectively denying petitioner's motion and second motion for supervisory order, etc., are set out at App. N, pp. App. 47-48, and App. O, pp. App. 49-50.

The Order of the Supreme Court of Illinois, No. 88351, entered Dec. 1, 1999, denying leave to appeal, is set out at App. P, p. App. 51.

The Order of Supreme Court of The United States, No. 99-1469, April 17, 2000, denying petitioner's petition for a writ of certiorari, is set out at App. Q, p. App. 52.

Jurisdictional Statement

The order sought to be reviewed was entered by the United States Court of Appeals for the Seventh Circuit on April 29, 2002. (App. A, pp. App. 1-3)

The Order also sought to be reviewed was entered by the United States District Court for the

Northern District of Illinois, Eastern Division on May 18, 2001. (App. B, pp. 3-12)

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

Constitutional Provision Involved

The federal constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Statement of Facts

Petitioner (then, defendant) was convicted in the Circuit Court of Cook County by a jury, of aggravated criminal sexual assault, and aggravated kidnapping, and was sentenced to 105 years in prison. (C 12-13) Defendant had private counsel at trial, but appointed counsel on appeal. (C 71)

Appointed counsel raised only one issue on direct appeal, that defendant did not waive his right to be present for sentencing. (C 71)

The conviction and sentence were affirmed in an unpublished Order [People v. Brost, No. 1-95-0576 (1996)], and defendant's pro se petition for leave to appeal to the Illinois Supreme Court was thereafter

denied. (C 70-71)

Within the applicable State limitations period, petitioner filed in the Circuit Court, a "Motion to Toll Post-Conviction Statute and For Appointment of Counsel." (C 2) The motion asserted that he was indigent, that Stateville penitentiary was on 24-hour lockdown which prevented him access to a law library and inmate or other legal assistance, and that his legal papers had been taken from him during a prison "shakedown." (C 2) This motion was denied, without appointment of counsel. (C 2) (App. E, p. App. 23)

Defendant thereafter filed a pro se post-conviction [PC] petition, which was summarily denied as having been untimely-filed. (C 168) (App. F, p. App. 26) Defendant's petition made numerous allegations of ineffective assistance of trial and appellate counsel, and prosecutorial misconduct. (C 12-43)

Counsel was appointed to appeal the dismissal of the pro se petition, but appointed counsel filed an inadequate and incompetent Brief in the Appellate Court of Illinois, First Judicial District.

Prior to any decision being rendered by that Appellate Court, however, petitioner's family retained private counsel who, on March 4, 1999, was granted leave to substitute as appellate counsel, and to and including March 30, 1999, within which to file a

Supplemental Brief. (App. H, p. App. 32)

Thereafter, the Appellate Court denied the instanter filing of the Supplemental Brief, which raised three valid (viable) issues unraised by appointed counsel, as it was submitted four (4) days past its first due date. (App. J, p. App. 39)

The Appellate Court also denied at the same time, a Motion to Enlarge the Record, with evidence [official records of the Illinois Attorney Registration and Disciplinary Commission] that defendant's trial counsel was suspended from the practice of law for malfeasance about the time of defendant's trial. (App. K, p. App. 41)

Motion For Reconsideration was denied, as to both the above Orders. (App. L, p. App. 43)

A Motion for reconsideration filed by new and separate counsel, alleging ineffectiveness in the 4-day-late Supplemental Brief submission was denied. (App. M, p. App. 45)

The Supreme Court of Illinois denied two successive motions for supervisory Orders (Apps. N & O, pp. App. 47-50), and denied leave to appeal. (App. P, p. App. 51)

The dismissal of the pro se PC petition as untimely-filed was affirmed by the Appellate Court on

March 31, 1999. (App. I, p. App. 34)

The Illinois Supreme Court denied leave to appeal on December 1, 1999. (App. P, p. App. 51)

The United States Supreme Court denied petitioner's writ of certiorari thereafter, on April 17, 2000. (App. Q, p. App. 52)

Subsequently, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The United States District Court for the Northern District of Illinois, Eastern Division, dismissed same, concluding that the State court determination that petitioner's post-conviction petition was untimely-filed was binding on the District Court. (App. B, at App. 7-8) The District Court further held that the petition for writ of habeas corpus was untimely filed. (App. B, at App. 8-10) Petitioner's motion for reconsideration was thereafter denied. (App. C, pp. App. 13-17) The United States Court of Appeals for the Seventh Circuit thereafter denied petitioner's request for a certificate of appealability. (App. A, pp. App. 1-2)

RAISING THE FEDERAL QUESTION

The federal question was raised throughout these proceedings, inasmuch as the Fourteenth Amendment entitles a prison inmate meaningful access to the courts, and that right has been violated throughout these proceedings, as noted in the Statement of Facts, set out above.

REASONS FOR GRANTING CERTIORARI

1. ON THE QUESTION OF TIMELINESS OF THE HABEAS PETITION UNDER 28 U.S.C. § 2244(d), CERTIORARI SHOULD BE ALLOWED SO THIS COURT MAY CONSIDER AND RESOLVE SOME PERPLEXING, RECURRING AND CONTINUING PROBLEMS FACING THE FEDERAL JUDICIARY -- AS IS EVIDENT FROM CONFLICTING FEDERAL DECISIONS WITH RESPECT TO WHETHER A STATE COLLATERAL ATTACK [such as an Illinois post-conviction petition] IS "PROPERLY FILED" FOR PURPOSES OF TOLLING THE FEDERAL HABEAS LIMITATION PROVISION, EVEN IF THE STATE COURT EVENTUALLY DETERMINES IT WAS UNTIMELY FILED, WHERE STATE PROCEDURE ALLOWS AN EXCEPTION TO THE STATE PC FILING LIMITATION [such as lack of culpable negligence] AND THE PETITIONER CLAIMS TO COME WITHIN SUCH EXCEPTION.

The District Court's decision (Apps. B & C), to which the 7th Circuit (in effect) adhered when it refused to grant certificate of appealability (App. A), is founded on an interpretation of the AEDPA's habeas limitations provision, 28 U.S.C. § 2244(d), which is contrary to another decision of the 7th Circuit, contrary to decisions of other federal Courts of Appeal, and also contrary (in principle) to a most recent decision of this Court, Carey v. Saffold, No. 01-301, ___ U.S. ___, 71 CrL 354, decided June 17, 2002.

At issue is whether defendant's state (Illinois) collateral attack (post-conviction petition) was "properly filed" for purposes of tolling the one-year limitations provision of the AEDPA, 28 U.S.C. § 2244(d),[1] even though it was ultimately held untimely by the Illinois courts (Apps. F, I, P), where under Illinois law, a late petition may still be considered if defendant shows a lack of culpable negligence, and here, defendant claimed lack of culpable negligence.

The interpretation and application of the District Court here (App. B, at App. 7-9) conflicts with another recent 7th Circuit decision on the topic, Rice v. Bowen, No. 00-4034, 2001 U.S. App. LEXIS 14842, decided June 27, 2001. In reversing the District Court's timeliness dismissal of Rice's habeas petition, the 7th Circuit held that Rice's habeas was not time-barred, and stated:

> "Other circuits have also held that if a state's rule governing the timely commencement of post-conviction proceedings contains exceptions requiring courts to examine the merits of the petition before dismissing it, THE PETITION, EVEN IF

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[1] AEDPA provides that the limitation period is tolled while "a properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2).

> ULTIMATELY HELD TO BE TIME-BARRED, SHOULD BE REGARDED [for habeas limitations purposes under 28 U.S.C. § 2244(d)] AS PROPERLY FILED. [*9] See *Dictado v. Ducharme*, 244 F.3d 724, 727-28 (9th Cir. 2001); *Emerson v. Johnson*, 243 F.3d 931, 935 (5th Cir. 2001)[;] *Smith v. Ward*, 209 F.3d 383, 385 (5th Cir. 2000). Illinois provides a statutory exception to its post-conviction time limitation if 'the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.' 725 ILCS 5/122-1)c. . . . [T]he state courts had to consider the merits of Rice's petition before determining whether it was timely." Id. at *8-*9. (Emphases added.)

The 5th and 9th Circuit decisions cited and relied on by the 7th Circuit in Rice v. Bowen, supra -- Dictado v. Ducharme, 244 F.3d 724, 727-28 (9th Cir. 2001); Emerson v. Johnson, 243 F.3d 931, 935 (5th Cir. 2001); Smith v. Ward, 209 F.3d 383, 385 (5th Cir. 2000) -- thus also conflict with the District Court here. (App. B, at App. 7-9)

The instant decision is also contrary (in principle) to a most recent decision of this Court, Carey v. Saffold, No. 01-301, ___ U.S. ___, 71 CrL 354, decided June 17, 2002, wherein this Court held that under California's statutory collateral atttack provisions, which utilize a "reasonableness" standard

rather than a specific deadline, an application for state collateral review remains "pending" -- and thus tolls the statute of limitations applicable to a federal habeas corpus petition brought by a state prisoner, during periods between a state court's decision on the prisoner's application for collateral review and the filing of a notice of appeal to a higher state court, and this rule applies to California's post-conviction relief system.

Another decision arising within the 7th Circuit that demonstrates the conflicts and confusion surrounding the issue at hand, is Wilson v. Battles, No. 01-4336 (pending decision after oral argument in the 7th Circuit), where the District Court (N.D. Ill., E.D., No. 00 CV 7969) (Dec. 10, 2001), dismissed the habeas petition as untimely (after originally ruling that equitable tolling saved the habeas).

These conflicts and confusion within the federal judiciary with regard to this important issue, warrant the grant of certiorari to resolve the matter.

2. CERTIFICATE OF APPEALABILITY SHOULD HAVE ISSUED, IN THAT CONFLICTING FEDERAL DECISIONS ON THE TIMELINESS ISSUE (see Question 1) DEMONSTRATE THAT REASONABLE JURISTS COULD DISAGREE AS TO TIMELINESS.

Certificate of appealability should issue where reasonable jurists could differ as to the procedural (here, timeliness) ruling. Slack v. McDaniel, 529 U.S. 473, 146 L.Ed.2d 542 (2000).

Here, the conflicts and confusion pointed out in Point 1, supra, demonstrate that reasonable jurists do indeed differ as to whether a state post-conviction petition is "pending" for federal habeas limitation tolling purposes in circumstances similar to at bar.

3. A STATE COURT DETERMINATION THAT A POST-CONVICTION PETITION IS UNTIMELY-FILED, SHOULD NOT BE INFLEXIBLY BINDING ON A FEDERAL HABEAS COURT FOR PURPOSES OF COMPUTING WHETHER A FEDERAL HABEAS PETITION IS TIMELY, WHERE, AS HERE, THE STATE COURT DETERMINATION VIOLATES DUE PROCESS UNDER THE 14th AMENDMENT TO THE U.S. CONSTITUTION BECAUSE IT WAS ARBITRARY AND CAPRICIOUS AS WELL AS IN CONTRAVENTION OF SETTLED STATE LAW.

The District Court cited Fernandez v. Sternes,

227 F.3d 977, 978 (7 Cir. 2000), for the proposition that "however mistaken or unfair it may" be, if a state court rejects a post-conviction petition as procedurally irregular, that determination is "binding" on the federal courts. (App. B, at App. 7)

Such a rigid standard is in conflict with the decision in Marino v. Ragen, 322 U.S. 561, 92 L.Ed. 170 (1947), and the Fourteenth Amendment, where -- as here -- the state court determination violates due process under the 14th Amendment to the U.S. Constitution, because it was arbitrary and capricious as well as in contravention of settled Illinois law.

Illinois law is clear that a trial court upon receiving a "pro se petition, however labeled, and however inartfully drawn, alleg[ing] violations of the petitioner's constitutional rights in a post-conviction proceeding, [s]hould thereafter, for all such purposes, treat it as such." People ex rel. Palmer v. Twomey, 53 Ill.2d 479, 292 N.E.2d 379, 382 (1973).

Had the state court(s) followed Illinois law, petitioner's initial *pro se* submissions should have been treated as a post-conviction petition, and petitioner would not have been barred access to the courts on timeliness grounds. (See Statement of Facts, above.)

The "federal courts should be open to a petitioner," "whenever it may become clear that the alleged state remedy is nothing but a procedural

morass offering no substantial hope of relief." Marino v. Ragen, supra, 92 L.Ed.2d at 173, 175.

A prison inmate is entitled to meaningful access to the courts under the Due Process Clause of the Fourteenth Amendment. Bounds v. Smith, 430 U.S. 817, 52 L.Ed.2d 72, 80 (1977).

A State court determination that a post-conviction petition is untimely-filed, should not be inflexibly binding on a federal court, where as here, the State court determination was so arbitrary and capricious that it violates due process. Certiorari should be allowed so that this court may discourage habeas courts from failing to consider whether a State decision they are supposed to follow, was entered in violation of federal due process.

4. PRINCIPLES OF STATUTORY CONSTRUCTION AND JUDICIAL ECONOMY MILITATE AGAINST THE DISTRICT COURT'S HOLDING THAT THE HABEAS WAS UNTIMELY.

The District Court ultimately concluded that "even if Brost's post-conviction petition *had* tolled the limitations period, his habeas petition would be untimely," (App. B, at App. 8) (emphasis in original), because petitioner's petition for writ of certiorari filed in this Court (to the Illinois Supreme Court) did not toll the limitations period, as a pending certiorari

petition is "not a form of 'State . . . review.'" (App. B, at App. 8-9, fn. 4; see pp. App. 8-9.)

The origin of this legal reasoning, in all of the decisions in this context, arises from the stated conclusion that the word "State" modifies both the phrase "post-conviction review" and the phrase "other collateral review," in 28 U.S.C. § 2244(d)(2). See, e.g., Bunney v. Mitchell, 241 F.3d 1151, 1156 (9 Cir. 2001). See also, Order denying writ of habeas corpus, p. 4, fn. 4. (App. B, at App. 8-9, fn. 4)

This reasoning is flawed -- per principles of statutory construction, and per principles of judicial economy.

There is an entire body of settled law, relative to the use of the word "or" in a statute. United States v. Johnson, 791 F. Supp. 242, 244 (E.D. Mo. 1992).[2]

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[2] See also, e.g., GenCor Inc. v. American Intern. Underwriters, 178 F.3d 804, 821 (6 Cir. 1999) ("or" is a "disjunctive" term which provides alternatives); United States v. Smith, 35 F.3d 344, 346 (8 Cir. 1994) ("or" may not be construed to mean "and"); In re Pacific Rim Investments, LLP, 243 B.R. 768, 771 (D. Colo. 2000) (word "or" in Bankruptcy Code's stay provisions reflects that the statute creates independent alternative bases upon which a bankruptcy court may grant relief).

Bunney and similar decisions fly in the face of this settled principle of statutory construction.[3]

The reasoning of the Bunney Court and similar decisions in this context, necessarily means that the authors of 28 U.S.C. § 2244(d)(2), wrote this statute grammatically incorrectly, and that they do not know how to position modifiers correctly.

Ambiguity and the rule of lenity

The Supreme Court has a "long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity." United States v. Smith, 35 F.3d 344, 346 (8 Cir. 1994).

The rule of lenity operates to resolve any ambiguity in the defendant's favor. United States v. Granderson, 511 U.S. 39, 127 L.Ed.2d 611, 627-28 (1994).

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[3] The holdings are flawed also, because this reasoning is contrary to basic rules of English language composition, grammar, and grammatical construction. See generally STILMAN, A., GRAMMATICALLY CORRECT: THE WRITER'S ESSENTIAL GUIDE TO PUNCTUATION, SPELLING, STYLE, USAGE AND GRAMMAR, PART FOUR: "Grammar, Positioning Modifiers Correctly," at 232-34 (Writer's Digest Books, Cincinnati, Ohio, 1997).

Judicial Economy and Efficiency

The holdings are also flawed because the reasoning conflicts with settled principles of judicial economy.

Although a petitioner need not file a petition for writ of certiorari from the denial of State post-conviction relief, before filing a federal petition for writ of habeas corpus -- a petitioner is not barred from doing so.

The Bunney reasoning, would require a petitioner, thus, in nearly every case where a petition for certiorari is filed, to, in essence, simultaneously seek relief in a federal district court, at the same time as seeking relief in the United States Supreme Court.

What if certiorari was granted, in this scenario? Should a district court be conducting litigation concerning constitutional claims, at the same time that the United States Supreme Court has taken the same issue or issues, for its resolution?

Rules of judicial economy should apply, if doing so will save considerable time and unnecessary expense in preparation for all parties in court. Keister v. Dow Chemical Co., 723 F.Supp. 117, 120 (E.D. Ark. 1989).

Judicial efficiency also relates to the efficiency

with which parties are able to resolve their differences. Twyman v. Wedlo, Inc., 204 B.R. 1006, 1008 (N.D. Ala. 1996).

The Bunney reasoning is flawed, and yet another calculated stratagem to block prisoners from access to the courts. No good will come in the end, from refusing to allow our bursting prison population the right to petition the Government for a redress of grievances.

5. IN ANY EVENT -- THE DISTRICT COURT SHOULD HAVE APPLIED THE DOCTRINE OF "EQUITABLE TOLLING" OF THE FEDERAL HABEAS LIMITATION PERIOD.

Defendant raised in the District Court -- which did not address the issue in its Orders (Apps. B & C) -- that even if the habeas petition (*arguendo*) were time-barred, the circumstances outlined in the pleadings (see Statement of Facts, above) warranted application of the doctrine of equitable tolling. The court should have considered this claim. See, e.g., Davis v. Johnson, 158 F.3d 806, 811 (5 Cir. 1998), citing and relying on Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 71 L.Ed.2d 234, 243 (1982); cf. United States v. Patterson, 211 F.3d 927 (5 Cir. 2000).

A well-pleaded claim of equitable tolling, as here, must not be rejected out-of-hand without

evidentiary hearing in a habeas proceeding. See Townsend v. Sain, 372 U.S. 293, 9 L.Ed.2d 770 (1963); Machibroda v. United States, 368 U.S. 487, 494-96, 7 L.Ed.2d 473, 478-79 (1962); Castillo v. United States, 34 F.3d 443 (7 Cir. 1994).

For this reason as well, certiorari should be allowed, to enable this Court to ensure that habeas forums consider claims of equitable tolling on the merits rather than simply ignoring the issue, as was done here.

CONCLUSION

For any and/or all of the above reasons, certiorari should be allowed.

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